

NEW HAMPSHIRE REAL ESTATE COMMISSION

COMMISSION MEETING

AUGUST 19, 2003

A meeting of the New Hampshire Real Estate Commission was held on Tuesday, August 19, 2003 at 9:00 a.m. in Room 425, State House Annex, 25 Capitol Street, Concord, New Hampshire 03301.

Meeting called to order at 9:00 a.m. by Chairman ARTHUR SLATTERY

Present: Commissioners ARTHUR SLATTERY, MARTIN SMITH, BARBARA HEATH, PAULINE IKAWA, NANCY LeRoy, Executive Director BETH EMMONS, and Investigator ANN FLANAGAN.

- I. Motion by Commissioner HEATH, seconded by Commissioner LeRoy, to approve and accept the minutes of the Commission meeting held on July 30, 2003.

II. APPOINTMENTS

9:00 a.m. - Equivalency Interviews

| <u>CANDIDATE</u> | <u>COMMISSIONER</u> | <u>DETERMINATION</u> |
|------------------|---------------------|----------------------|
| STEVEN WELLS | SLATTERY | APPROVED |

9:15 a.m. – MICHAEL BROOKS appeared before the Commission to explain a “yes” answer to question #4 on his salesperson’s renewal application. After explanation, discussion and review, and on motion by Commissioner HEATH, seconded by Commissioner LeRoy, the Commission unanimously decided to allow Mr. Brooks to renew his license.

9:30 a.m. – ROB THOMPSON appeared before the Commission to explain a previous legal incident prior to applying for a salesperson’s license. After explanation, discussion and review, and on motion by Commissioner LeRoy, seconded by Commissioner Heath, the Commission unanimously decided to allow Mr. Thompson to apply for his salesperson’s license.

9:45 a.m. – RONALD A. HADDOCK, JR. appeared before the Commission to explain a “yes” answer to question #7 on his salesperson’s application. After explanation, discussion and review, and motion by Commissioner Smith, seconded by Commissioner Heath, the Commission unanimously decided to deny Mr. Haddock’s application for an original salesperson’s license.

III. DISCUSSION

WARREN CHASE requested a clarification from the Commission on what an unlicensed assistant can do regarding vacation rental reservations. After review and discussion, the Commission directed the Executive Director to supply the Commission guidelines on unlicensed assistants to Mr. Chase.

FINAL APPROVAL OF INITIAL RULEMAKING PROPOSAL – After discussion and review, the following initial proposal, on motion by Commissioner LeRoy, seconded by Commissioner Smith, was unanimously approved by the Commission as final and to be submitted to Legislative Services for adoption:

Rea 301.02 Fees.

- (a) The applicant for each original individual or firm broker license and renewal thereof shall pay a fee of \$90.
- (b) The applicant for each original salesperson license and renewal thereof shall pay a fee of \$70.
- (c) The broker, salesperson or firm shall pay a fee of \$5 for each duplicate license.
- (d) The broker, salesperson or firm shall pay a fee of \$15 for each license amendment.
- (e) The broker, salesperson or firm shall pay a fee of \$5 for each certificate of license and good standing.
- (f) The applicant for each qualifying examination shall pay a fee of \$100.
- (g) The broker or salesperson shall pay a fee of \$25 or 5% of the face amount of the check, whichever is greater, plus all protest and bank fees for each check, draft or money order dishonored and returned to the commission pursuant to RSA 6:11-a.
- (h) The broker, salesperson or firm shall pay a late fee of \$50, in addition to the regular renewal fee, for renewal of a license up to 6 months after its expiration.
- (i) Real estate course providers shall pay an evaluation fee of \$30 each time a course is submitted to the commission for accreditation or reaccreditation.
- (j) Individual real estate licensees shall pay a fee of \$10 for each course submitted to the commission to be evaluated for continuing education credit.

RICHARD HARRIS of Harris Real Estate School requested approval of a video pre-licensing course at the July 15, 2003 Commission meeting. The Commission tabled their decision at its July meeting and requested further review of the course by the Education Program Assistant, Fran West. After review and discussion of the findings, and based on the Commission's previous decision not to allow non-classroom pre-licensing course hours, the Commission unanimously denied accreditation to Mr. Harris' course as submitted. Mr. Harris to be so notified.

IV. HEARING 10:25 AM

FILE NO. 2003-05-01 NEW HAMPSHIRE REAL ESTATE COMMISSION VS. ROBERT K. TOWNER

Evaluator: Commissioner SLATTERY

The following persons were present at the hearing:

Commission: Commissioners MARTIN SMITH, PAULINE IKAWA, BARBARA HEATH,
Executive Director BETH EMMONS and Investigator ANN FLANAGAN.

Stenographer: Barry Nolin

Gerard J. Nolin & Associates, LLC
P.O. Box 1088
Concord, NH 03302-1088

Evaluator: Commissioner SLATTERY evaluated the above matter and abstained from participation in the discussion and resulting decisions. Commissioner LeRoy was a recused member and abstained from participation in the discussion and resulting decisions.

Complainant: Robert K. Towner

Coldwell Banker Steve Weeks Realtors
348 Court Street
Laconia, NH 03246

Attorney: John P. Kacavas

Hatem, Donovan & Kacavas
175 Canal Street, 2nd Floor
Manchester, NH 03101

Witnesses: Stephen Preston
Stephen E. Weeks

Respondent: NH Real Estate Commission through its Investigator Ann Flanagan

Attorney: Pro Se

DECISION: Pending – subject to review of transcripts and exhibits.

V. **OTHER BUSINESS**

1. Tuesday, September 16, 2003, was unanimously approved as the date for the next regular meeting.

2. CASE EVALUATIONS

(a) **FILE NO. 2003-03-02**

Evaluator: Commissioner IKAWA

Determination: No violation, should not be heard.

(b) **FILE NO. 2003-03-04**

Evaluator: Commissioner IKAWA

Determination: Should be heard, hearing to be scheduled. In the alternative, the Commission unanimously approved to offer a Settlement Agreement with a disciplinary action of a required 3 hour Commission approved continuing education course on Agency.

The above determinations were unanimously approved.

3. ORDERS

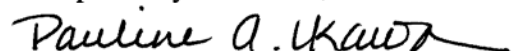
The following Order was issued by the New Hampshire Real Estate Commission. A copy of the Order is attached and becomes part of the official minutes of this meeting.

FILE NO. 2000-10-03 RACHEL & RICHARD POULIN & THE NEW HAMPSHIRE
REAL ESTATE COMMISSION VS DENISE WILLIAMS & HENRY MAXFIELD, JR.

VI. **ADJOURNMENT**

Motion by Commissioner HEATH, seconded by Commissioner IKAWA to adjourn the meeting. Acting Chairman SMITH adjourned the meeting at 1:37 p.m.

Respectfully submitted,



PAULINE A. IKAWA
Acting Clerk

STATE OF NEW HAMPSHIRE REAL ESTATE COMMISSION

ORDER

FILE NO. 2000-10-03

RACHEL & RICHARD POULIN
&
NEW HAMPSHIRE REAL ESTATE COMMISSION
VS
DENISE WILLIAMS & HENRY MAXFIELD JR.

This matter comes before the Real Estate Commission on the complaint of Rachel and Richard Poulin, complainants, alleging violations of NH RSA 331-A:25-b, I(2), RSA 331-A:25-d, II(b), and RSA 331-A:26, XII and XXXVI by Denise Williams and Henry Maxfield Jr., respondents; and the New Hampshire Real Estate Commission, through its Investigator Ann Flanagan, complainant, in addition alleging violations of New Hampshire Code of Administrative Rules Rea 701.01 by Denise Williams, respondent, and NH RSA 331-A:26, XXVII by Henry Maxfield Jr., respondent. The Real Estate Commission after notice and hearing in the above captioned matter makes the following findings of fact:

1. Henry S. Maxfield, Jr. was licensed as a real estate salesperson on 05/15/72 and as a real estate broker on 10/18/76, and was so licensed and the principal broker of Henry S. Maxfield Real Estate at the time of the alleged violations.
2. Denise Williams was licensed as a real estate salesperson on 06/17/86 and as a real estate broker on 06/16/88, and was so licensed and associated with Henry S. Maxfield Real Estate at the time of the alleged violations.
3. Richard and Rachel Poulin (hereinafter referred to as complainants) listed their property (Rachel Poulin Revocable Trust, Rachel Poulin trustee) located at 5 Mountain West, Wolfeboro, New Hampshire, with Henry S. Maxfield Real Estate on June 04, 2000 through December 01, 2000, for \$289,900. The Poulins originally interviewed Henry S. Maxfield, Jr., and were referred to listing agent Denise Williams (Complainant's Exhibit 3).
4. At the time of listing on June 04, 2000, Rachel Poulin signed an Agency Disclosure Form indicating that Henry S. Maxfield Real Estate represented the sellers (Complainant's Exhibit 1).
5. At the time of listing on June 04, 2000, Rachel Poulin also initialed a Dual Agency Consent Agreement indicating that she had reviewed and understood dual agency. The contract form itself was blank. Complainants and respondents all agreed

that it was used as an explanation of dual agency at the time of listing, in the event that dual agency should occur at some future time (Complainant's Exhibit 2).

6. Denise Williams testified that if a dual agency situation were to exist, that it would then need to be disclosed to all parties and agreed upon (Tr. p. 92, lines 7-9).

7. Denise Williams' sequence of events submitted with her Form 11-A reply to the formal complaint indicates that another agent for Henry S. Maxfield Real Estate, Tony Triolo showed the Poulins' unit to George and Bernice Singleton as buyer customers in the morning of June 13, 2000.

8. Denise Williams' sequence of events submitted with her Form 11-A reply to the formal complaint further indicates that later in the afternoon of June 13, 2000, the Singletons signed with Tony Triolo as their Buyer Agent for one day, June 13, 2000 until June 14, 2000, prior to showing them a different non-listed unit in Moultonboro (Complainant's Exhibit 4).

9. Denise Williams testified that she assumed that Tony Triolo represented the sellers when he showed Poulins' property to the Singletons on June 13, 2000, because he did not disclose anything otherwise to her (Tr. p. 118, lines 12-15).

10. Rachel Poulin testified that she assumed that Tony Triolo represented the sellers when he showed Poulins' property to the Singletons the first time, because she was home at the time of the showing and he did not disclose anything otherwise to Mrs. Poulin (Tr. p. 49, lines 5-10).

11. Rachel Poulin testified that she was also at home another time Tony Triolo showed the property to the Singletons and he did not disclose anything then either (Tr. p. 49, lines 14-21).

12. Richard Poulin testified that they received eight show slips from Henry S. Maxfield Real Estate, but they never received any show slips for the Singletons showings (Tr. p. 29, lines 8-15).

13. Counsel for respondents indicated that the Singleton show slip in Tab 4 of respondents Exhibit is not as clear as the other eight show slips because it was photocopied from respondents' yellow copy (Tr. p. 100, lines 1-7).

14. Henry S. Maxfield testified that he was very involved in the transaction (Tr. p. 146, line 14) and felt that Tony Tiolo was representing the sellers of the property (Tr. 146-147, lines 23-1; and Tr. p. 159-160, lines 22-4) and was acting properly without disclosure to the sellers as a non-agent in another relationship with the Singletons on the June 13, 2000 showing of the Poulins' property (Tr. 140-141, lines 21-5), then switched to a one-day Buyer Agent later that day as the Singletons looked at a different property (Tr. p. 162, lines 2-6), then switched to a Dual Agent when Singletons made an offer on the Poulins' property (Tr. p. 158, lines 17-22).

15. Denise Williams' sequence of events submitted with her Form 11-A reply to the formal complaint states that on June 26, 2000, Tony Triolo as a Dual Agent brought an offer in on the Poulin's unit from the Singletons, and that this was the first time it was disclosed to Denise Williams that Tony Triolo was representing the Singletons. This was a written offer for \$270,000 signed by the Singletons on June 16, 2000 (Complainant's Exhibit 6).

16. Denise Williams testified that the first written offer from the Singletons for the Poulins' property for \$270,000 came in on June 26, 2000, but she could not give the written offer to the Poulins because Mr. Poulin did not want her to fax his personal business over the hotel fax machine where he and Mrs. Poulin were staying for a business meeting (Tr. p. 103, lines 20-22).

17. Denise Williams testified that it did not occur to her to just drop the Singleton's written offer with dual agency disclosure paperwork in the mail since the Poulins were going to be home the next day and she expected to meet with them (Tr. p. 129, lines 8-22).

18. Richard Poulin testified when Denise Williams called him at the hotel on June 26, 2000 about the \$270,000 offer, that he verbally rejected the offer because it was too low, and that he wanted to wait and see if any better offers came in since it had not been on the market very long and there seemed to be other interested buyers (Tr. p. 29, lines 8-23) and it was a uniquely desirable property (Tr. p. 57, lines 8-20).

19. Denise Williams' sequence of events submitted with her Form 11-A reply to the formal complaint indicates that she advised Richard Poulin to counter-offer the Singleton's offer because she thought that Mr. Poulin's negotiating strategy might alienate the Singletons and cause them to purchase a different property (Tr. p. 124-125, lines 5-23 and 1-11).

20. Denise Williams testified that she knew she was a dual agent when she advised the Poulins to counter-offer even though they were reluctant to do so because they did not want to lower their price that soon in the listing and that they were not in any particular hurry to sell their property (Tr. p. 123, lines 17-23).

21. Denise Williams testified that there were negotiations back and forth over two days and finally a verbal agreement at \$283,000 (Tr. p. 109-110, lines 23-3).

22. Rachel Poulin testified that Denise Williams told her they would be smart to accept the offer because it was a very good price and that she felt that they would not be able to do better (Tr. p. 65-66, lines 22-3).

23. Denise Williams quoted from her Agency Disclosure Form under disclosed dual agent: "A disclosed dual agent may not reveal confidential information regarding but

not limited to.... confidential negotiating strategy not disclosed in the sales contract as terms of the sale, and that undisclosed dual agency is illegal" (Tr. p. 126-127, lines 15-2).

24. Denise Williams' sequence of events submitted with her Form 11-A reply to the formal complaint indicates that as of June 26, 2000 she was aware of the fact that her agency relationship with the Poulins had changed from her original disclosure to them as their seller agent to a dual agent.

25. Henry S. Maxfield, Jr. testified that Denise Williams disclosed by phone to Richard Poulin on June 26, 2000 that she was now acting as a dual agent at the time of the first written offer to purchase their property (Tr. p. 169, lines 21-23).

26. On June 28, 2000, Denise Williams met with the Poulins and presented to them the Dual Agency Consent form and the written offer (the Sales Agreement and Deposit Receipt dated June 28, 2000) (Tr. p. 111, lines 18-23). Both documents were signed by the Poulins on June 28, 2000.

27. Denise Williams testified that when she presented the final written offer to the Poulins on June 28, 2000, they were quite upset about the dual agency and accused Denise Williams of not disclosing it (Tr. p. 111, lines 11-23).

28. Richard Poulin testified that they were negotiating without having knowledge of the dual agency situation and that is why they made this formal complaint to the Real Estate Commission (Tr. p. 64, lines 9-11).

29. Rachel Poulin testified that she felt that they could have got their listing price if they the agents from Henry S. Maxfield Real Estate had worked it and worked better on it (Tr. p. 77, lines 12-15).

30. Richard Poulin testified that he had agreed to sell their property to the Singletons for \$283,000 and to do anything otherwise would have caused him to breach his word (Tr. p. 66-67, lines 18-6; and Tr. p. 76-77, lines 22-1).

31. Henry S. Maxfield, Jr. testified that he felt that his agents did a very fine job in this transaction and he had the utmost confidence that they had done their jobs properly (Tr. p. 152-153, lines 22-3).

32. Henry S. Maxfield, Jr. testified that it is his contention that Tony Triolo had the perfect right and authority to opt up from a non-agency relationship to a buyer agency relationship even after a non-agent showing on an in-house agent listing (Tr. p. 157, line 7-19).

33. Henry S. Maxfield, Jr. testified that he was advised that it is doable to be a non-agent and show your own listings and a day or two later change to a buyers' agent and therefore to a disclosed dual agent in the process (Tr. p. 158, lines 17-22).

34. Henry S. Maxfield, Jr. testified that he does not think that he is flipping in and out of his relationship with his buyer because of his non-agency relationship with the buyer, so that when he goes and shows their listed properties that they represent the seller, and in his capacity as a non-agent he is still a non-agent with the buyer and he is now representing the seller (Tr. p. 159, lines 8-16).

35. Henry S. Maxfield, Jr. testified he believes that in a non-agency relationship you still represent the seller (Tr. p. 163, lines 18-19).

36. Henry S. Maxfield, Jr. testified that he contends that Tony Triolo was in a non-agency relationship with the buyer even though Tony Triolo represented the seller (Tr. p. 166, lines 12-19).

37. Counsel for respondents at the time of the hearing submitted a request for findings of fact.

Based on the foregoing findings of fact, the Commission hereby issues the following rulings of law:

When Tony Triolo first introduced the Singletons as buyer-customers to the Poulins' property, Tony Triolo could not have been acting as a non-agent in another relationship on his agency's listing; he was an exclusive agent of the sellers since it was his agency's listing.

Denise Williams testified that she did not know about Tony Triolo's relationship with the Singletons at the time and that she assumed that Tony Triolo was acting as an agent for the sellers. On June 26, 2000, Tony Triolo presented Denise Williams with a written offer from the Singletons for \$270,000. Denise Williams called the Poulins at the Mount Washington Hotel and advised them of the offer and that a dual agency now existed. Due to the Poulins' objection to receiving the Singleton offer via fax on June 26, 2000, and their subsequent refusal to let Denise Williams present the written offer (and Dual Agency Consent Agreement) after their return home until June 28, 2000, Denise Williams was forced to advise the Poulins of the dual agency status by telephone and could not present the consent form or the offer until June 28, 2000. Denise Williams did present the Dual Agency Consent form and the written offer on June 28, 2000. Therefore, the Commission rules that Denise Williams did not violate NH RSA 331-A:25-b, I(2), RSA 331-A:25-d, II(b), and RSA 331-A:26, XII, XXXVI or New Hampshire Code of Administrative Rules 701.01.

Henry S. Maxfield, Jr. is the principal broker and owner of Henry S. Maxfield Real Estate. He testified that he was involved in this transaction and that he felt that his agents acted properly. He also testified that he thought it was permissible to change from a sellers' agent to a non-agent in another relationship, then because of the one-day buyer-agency agreement for a different property, advised Tony Triolo to become a buyer-agent for the Singletons on the Poulin listing, and then become a dual agent. The Commission is extremely concerned that an experienced principal broker could have these kinds of misconceptions, and the Commission is further concerned that Henry S. Maxfield, Jr. still

seems to maintain these misconceptions, even after these proceedings. The Commission does not feel that Henry S. Maxfield, Jr. lacks the intelligence or effort to educate himself in these matters, but rather the Commission is concerned that there is an industry-wide problem with real estate licensees misunderstandings of dual agency concepts. The Commission wants to make it clear that it does not support and has never supported the practice of dual agency. Rather it was the industry that enacted and supports the practice of dual agency. However, since dual agency is legally permitted and practiced in New Hampshire, and due to the serious changes to fiduciary responsibilities which are associated with dual agency, the Commission must require that the high standards of written disclosure and informed consent be adhered to. If a principal broker is going to allow his agents to practice dual agency, then it is his responsibility to educate himself and his agents regarding the practice of dual agency. Therefore, the Commission rules that Henry S. Maxfield, Jr. did violate NH RSA 331-A:26, XXVII.

The Commission rules that Henry S. Maxfield, Jr. did not violate NH RSA 331-A:25-b, I(2), RSA 331-A:25-d, II(b), RSA 331-A:26, XII, XXXVI or New Hampshire Code of Administrative Rules Rea 701.01.

In view of the foregoing rulings of law, the Real Estate Commission hereby Orders that Henry S. Maxfield, Jr. shall pay a disciplinary fine to the State of New Hampshire General Fund in the amount of \$200 and complete a three-hour course taught by a Commission approved instructor on Agency including an emphasis on dual agency, not later than sixty (60) days from the date of this Order. Henry S. Maxfield, Jr. shall provide to his agents the opportunity to attend said course within the same time period at no cost to said agents.

Respondents submitted a request for findings of fact and rulings of law. The Commission rules on the Respondents' request as follows:

1. Denied as worded; dual agency existed previously under other citations (e.g. RSA 331-A:26, XII).
2. Denied as worded; absent written consent an illegal "undisclosed" dual agency could exist.
3. Granted
4. Granted
5. Denied to the extent it conflicts with RSA 331-A:25-d, II(e).
6. Denied as worded, if "section" refers to the Restatement cited, but in any event not a basis for decision.
7. Granted
8. Denied; dual agency was addressed prior to June 1998 in other citations.
9. Denied; dual agency was addressed in rules prior to May 6, 2000.
10. Denied; statutes and rules are posted on the state's web site, www.state.nh.us
11. Granted
12. Granted

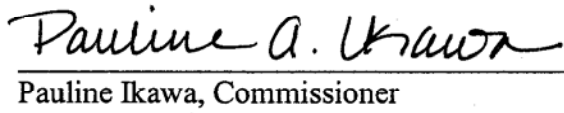
13. Denied as worded; the rule does not require Commission approval of a form, only compliance with Rea 701.01(f).
14. Denied; the Commission "provides" a form upon request, the rule does not require the Commission to "publish" a form.
15. Denied; the Commission has approved several independent forms.
16. Granted
17. Granted
18. Granted, however, New Hampshire has no "offer" forms or requirements as does Massachusetts. An "offer" may be verbal but does not constitute a Contract for real estate even if accepted, in accordance with the Statute of Frauds.
19. Granted if "valid" means capable of legal acceptance to result in a binding contract for real estate.
- 20-22. Granted
23. Granted in part, Denied in part. Statement regarding "single broker showings" is vague and undefined.
- 24-28. Granted
29. Granted, however, as set forth above, an illegal "undisclosed dual agency could exist.
- 30-37. Granted
- 38-40. Neither Granted or Denied, since not pertinent to decision.
- 41-46. Granted
47. Granted if "valid" means capable of legal acceptance to result in a binding contract for real estate.
- 48-56. Granted
57. Granted that Respondent so testified.
58. Granted
59. Granted
- 60-61. Denied as worded; dates should be 2000.
- 62-76. Granted
77. Granted the Complainant so states.
- 78-79. Granted based on definition of "valid" as set forth above.
- 80-84. Granted
85. Denied, as detailed above.
- 86-89. Granted
- 90-92. Neither Granted or Denied; Respondents' testimony and conclusory interpretations.

Under the provisions of RSA 331-A28, III, this disciplinary action is subject to appeal in the Superior Court. The respondent has thirty (30) days from the date of this Order in which to file an appeal. Such an appeal will suspend the Commission's disciplinary action pending resolution of the appeal. If this decision is not appealed within thirty (30) days, this Order will become final.

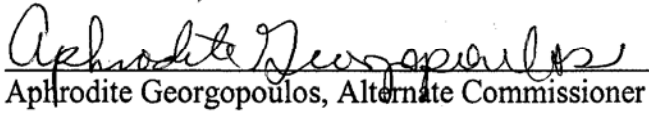
Commissioner Heath evaluated this case and did not take part in the hearing or decision. Commissioners Slattery and LeRoy recused themselves from the hearing and decision.


Martin Smith, Jr., Commissioner

8/19/03
DATE


Pauline Ikawa, Commissioner

8/19/03
DATE


Aphrodite Georgopoulos, Alternate Commissioner

8-21-03
DATE